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No. 257

Supreme Court of the United States

OCTOBER TERM, 1960

H. K. PORTER COMPANY, INC., ET AL., APPELLANTS,

versus

CENTRAL VERMONT RAILWAY, INC., ET AL.,
APPELLEES

BRIEF FOR H. K. PORTER COMPANY, INC.—THERMOID DIVISION—SUCCESSOR IN INTEREST TO THERMOID COMPANY—SOUTHERN DIVISION; RAYBESTOS-MANHATTAN, INC., GENERAL ASBESTOS AND RUBBER DIVISION; UNION ASBESTOS AND RUBBER COMPANY; AND CAROLINA ASBESTOS COMPANY.

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INTRODUCTION

This brief is filed for H. K. Porter Company, Inc.—Thermoid Division—Successor in interest to Thermoid Company—Southern Division; Raybestos-Manhattan, Inc., General Asbestos and Rubber Division; Union Asbestos and Rubber Company; and Carolina Asbestos Company. These appellants (sometimes hereinafter referred to as "Carolina Consumers"), all of which are located in North and South Carolina, were complainants before the Interstate Commerce Commission (hereinafter referred to as the Commission).

OPINIONS BELOW

The opinion of the District Court (R. 241-253) is reported at 182 F. Supp. 516. The report of the Interstate Commerce Commission (R. 60-79) is reported at 303 I. C. C. 743.

JURISDICTION

The judgment of the District Court was entered on March 7, 1960 (R. 241, 253). A motion for reconsideration, timely filed, was denied on March 26, 1960 (R. 260). Notice of Appeal was filed in the District Court on May 5, 1960 (R. 262). Probable jurisdiction was noted October 17, 1960 (R. 272). The jurisdiction of the Court upon appeal rests on 28 U. S. C. 1253 and 2101(b).

STATUTES INVOLVED

Sections 1(1)(a) and (2); 1(4), 1(5); 3(1); 6(1), 6(7); 8; 13(1); and 16(1) of the Interstate Commerce Act, 49 U. S. C. 1(1)(a) and (2), 1(4), 1(5); 3(1); 6(1), 6(7); 8; 13(1) and 16(1). Pertinent portions of these sections of the Interstate Commerce Act are reproduced in the Appendix, *infra*, pages 65-70.

QUESTIONS PRESENTED

1. Whether the District Court erred in failing to sustain the Commission's determination that acts by railroads operating within the United States in maintaining single factor joint rates applicable on asbestos and related commodities from points of Canadian origin in the province of Quebec to points in official territory, while maintaining through rates (made on a combination basis over an interior point in the United States) on a higher level for like service from the same Canadian origins to points in the Carolinas, were unduly prejudicial to shippers in the Carolinas and unduly preferential of competing shippers in offi-

cial territory, in violation of the Interstate Commerce Act (49 U. S. C. 3(1)).

2. Whether the District Court erred in holding that the Commission lacked power to determine the reasonableness and justness of through rates assessed on international shipments of asbestos and related commodities, moving over through routes on through bills of lading, from Canadian origins in the province of Quebec to points in southern territory in the Carolinas, for the purpose of determining damages under the provisions of the Interstate Commerce Act for a violation thereof, when the Commission found that rail carriers subject to its jurisdiction had failed to establish just and reasonable rates, for the service rendered, from the international boundary, as required by the Interstate Commerce Act (49 U. S. C. 1(5), 6(1) and (7)).

3. Whether the District Court erred in holding that the Commission did not have jurisdiction for any purpose over proportional rates, filed with the Commission by the Canadian carriers, applying on asbestos and related commodities from Canadian origins in the province of Quebec to East Alburgh and Newport, Vermont, duly restricted to apply only on shipments moving to destinations in the United States, for use by all participating carriers in the through transportation service rendered over through routes in constructing through transportation charges assessed receivers of asbestos and related commodities at points in the United States, where no through single factor joint rates were published in the same tariff.

STATEMENT

These are direct appeals from the final judgment of the District Court setting aside and annulling the report and order of the Commission dated May 7, 1958 (R. 60-81), as clarified by order of the Commission entered March 11, 1959[1] (R. 225-226). The pertinent facts may be stated as follows:

The proceedings before the Commission, which are under review in this appeal, were initiated by "Carolina Consumers" through complaints duly filed with the Commission under section 13(1) of the Interstate Commerce Act (49 U. S. C. 13(1)). The complaints allege that the single factor joint rates maintained by the defendant railroads from the Canadian mine origins to destinations in official territory for application on asbestos products were unduly prejudicial to "Carolina Consumers" and unduly preferential of consignees in official territory[2], in violation of the Interstate Commerce Act (49 U. S. C. 3(1)); and further, that the through transportation charges assessed "Carolina Consumers" were unduly prejudicial to them and unduly preferential of consignees in official territory in violation of the Act (49 U. S. C. 3(1)). The "Carolina Consumers" also alleged that the through transportation charges assessed them were unjust and unreasonable, in violation of the Act (49 U. S. C. 1) and prayed damages in the form of reparation as authorized by the Act (49 U. S. C. 8 and 16(1)).

After hearings before an Examiner, receipt of original briefs, rendition of the Examiner's proposed report and

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[1] The order of March 11, 1959, among other things dispelled any doubt that the method of adjusting rates to remove the unlawful discriminations found to exist was left to the option of the rail carriers. See *Texas & P. Ry Co. v. United States*, 289 U. S. 627, 650.

[2] Official territory, broadly speaking, lies east of the Mississippi River and north of the Potomac and Ohio Rivers. *Class Rate Investigation, 1939*, 262 I. C. C. 447, 457.

recommended order (R. 177), and oral argument, the Commission rendered its decision dated May 7, 1958 (R. 60). The Commission found that "Carolina Consumers'" competitors in official territory were being assessed through rates which unduly preferred them to the undue prejudice and disadvantage of "Carolina Consumers"; and that the through rates assessed the "Carolina Consumers" were unduly prejudicial to them and unduly preferential of their competitors in official territory; and further, that "Carolina Consumers" had been and were being assessed unjust and unreasonable through transportation charges on asbestos and they were directed to comply with Rule 1.100 of the **General Rules of Practice** relating to an award of damages for the violations of the Act found to exist.

The pertinent facts and circumstances which the Commission found in support of its decision may be stated as follows:

The "Carolina Consumers" are manufacturers of asbestos textile products and other products, such as asbestos shingles, at points located in the states of North Carolina and South Carolina. In the sale and marketing of these products throughout the United States they are in competition with similar manufacturers of asbestos textile products and other products, such as asbestos shingles, located in what is known as official territory. "The principal markets for asbestos textile products manufactured by the complainants are in official territory, and a number of competitive manufacturers are also located there." (R. 66.)

The basic major raw materials utilized in the manufacture of asbestos textile products and asbestos shingles are crude asbestos, asbestos fiber generally, asbestos waste, and abestos refuse and shorts. These products are strategic materials and are obtained by manufacturers, both in the Carolinas and in official territory, from asbestos producing mines located in the province of Quebec, Canada.

Since the turn of the century, manufacturers located in official territory have been assessed through transportation charges from the Canadian mines based on single factor joint rates[3] filed with the Commission in due tariff form. The defendant railroads before the Commission, participating in the through transportation service from the producing mines in Canada to destinations in official territory, have never established and maintained rates applicable on asbestos traffic originating in Canada from the international boundary line to destinations in official territory.

"Carolina Consumers" have always been assessed through transportation charges constructed out of existing proportional rates, published and filed with the Commission by the Canadian carriers,[4] applying from the Canadian mines to East Alburgh and Newport, Vermont, and local rates of the remaining participating carriers applying from East Alburgh and Newport to Carolina destinations at which appellants' plants are located.[5] The defendant railroads, participating in the through transportation service to destinations in the Carolinas, have never established and maintained rates applicable from the international boundary line, for application on asbestos which originated in Canada, to destinations in the Carolinas.

The proportional rates[6] from the Canadian mines to East Alburgh and Newport, Vermont, are published in the same tariffs on file with the Commission which contain the

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[3] The Act does not authorize or forbid the making of joint through international rates. See *Lewis-Simas-Jones Co. v. Southern Pac. Co.*, 283 U. S. 654, 660, Note 1.

[4] Canadian National Railways and Quebec Central Railway Company.

[5] The through transportation charges on asbestos waste from Canadian National Railway Company mines to Davidson, North Carolina, are determined by use of factors to and from Baltimore, Maryland.

[6] These proportional rates cannot be applied save as they are parts of a through rate and cannot be distinguished from divisions of a joint rate. See *Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co.*, 269 U. S. 217; *Great Northern Ry. Co. v. Sullivan*, 294 U. S. 458, 463.

single factor joint rates from the Canadian mines to points in official territory. These proportional rates are restricted in the tariffs so as not to apply to any intermediate point in Canada and labeled with a reference mark, the explanation of which reads as follows: "Proportional rate, applicable only on shipments destined to points in the United States." The proportional rates to East Alburgh, Vermont, are published by the Canadian National Railway Company for application from mines on its line in the province of Quebec. The line of the Canadian National Railway Company extends across the international boundary about 3.1 miles to East Alburgh, Vermont, where it connects with the line of the Central Vermont Railway, Incorporated. The proportional rates to Newport are published by the Quebec Central Railway Company for application from mines on its line in the province of Quebec. The Quebec Central Railway Company extends across the international boundary about 5 miles to Newport, Vermont, where it connects with the Canadian Pacific Railway Company.[7]

The Commission held that the proportional rates maintained by the Canadian lines to East Alburgh and Newport, Vermont, were published to interior points in the United States and obligated the Canadian carriers to provide a substantial transportation service within the United States (R. 73).

The local rates[8] applicable from East Alburgh and Newport, Vermont, were and are all class rates with the

[7] The Quebec Central is a subsidiary of the Canadian Pacific. See *Canadian Pacific Railway Company Lease*, 105 I. C. C. 575, 576.

[8] These local class and commodity rates were and are published to apply on traffic originating at East Alburgh or Newport, Vermont. These contain an originating terminal charge and a terminating terminal charge. During the oral argument before the Commission the appellees admitted that no asbestos traffic originates at East Alburgh and Newport. These local rates do not reflect the charge for the transportation service rendered. It is obvious that the appellees have made no attempt whatsoever to comply with the provisions of the statute, as interpreted by this Court, to make and establish rates either from the international boundary line or from East Alburgh and Newport to Carolina destina-

single exception of rates applicable on asbestos fiber to Charlotte, Davidson, and Marshville, North Carolina, which are commodity rates. These class rates are the class 35 rates prescribed by the Commission in Docket No. 28300—**Class Rate Investigation, 1939**, 281 I. C. C. 213. The commodity rates have as their base the class A rates in effect prior to Docket No. 28300 revision. The class A, or eighth class, rate from Newport to Charlotte was published as a commodity rate to apply over routes not generally available under class-rate routing. Due to lesser general increases authorized by the Commission on commodity rates than on class rates, and the readjustment of the class rates by order of the Commission in Docket No. 28300, this Newport-Charlotte commodity rate ultimately controlled the going rates from East Alburgh and Newport, Vermont, to Charlotte, Davidson, and Marshville, North Carolina, over all authorized tariff routes. (R. 66.)

As previously stated, the Commission found the assailed rates to be both unduly preferential and prejudicial, in violation of the Act (49 U. S. C. 3(1)) and ordered the carriers to establish rates for application on shipments to Carolina destinations which would not exceed the rates to points in official territory by more than specified amounts[9] (R. 77). The Commission also found that the assailed through rates to the Carolina destinations were unjust and unreasonable and in violation of the Act (49 U. S. C. 1(5)), and that the "Carolina Consumers" were damaged and entitled to reparation (R. 78). In the March 11, 1959, order the Commission clarified its prior order of May 7, 1958, so as to indicate that the carriers were left with alternatives in removing the discrimination found to violate the Act (49 U. S. C. 3(1)) (R. 232).

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tions which reflect the transportation service rendered in connection with the interchange (R. 199). *See Lewis-Simas-Jones Co. v. Southern Pac. Co.*, 283 U. S. 654, 660.

[9] See Note 1, page

The appellees, as defendants before the Commission, in their brief filed with that agency relied entirely on the contention that the Commission was without jurisdiction to determine the issues raised by the complaints since international rates were involved (R. 179). The Commission found this contention to be without merit.

The District Court set aside the decision of the Commission, and annulled the orders entered by the Commission, on the theory that the through rates assessed "Carolina Consumers" on international shipments of asbestos from Canadian origins to the Carolina destinations contained a proportional factor which was not subject to the Commission's jurisdiction (R. 242, 253).

The "Carolina Consumers" in their complaints before the Commission assailed the through transportation charges assessed them—they complained of the **through rate as a unit**. They did not complain merely of the aggregate of the individual proportional and local rates customarily charged by the defendants for transportation service rendered by the respective participating lines in the through routes. They complained of the single charge which was assessed for the transportation service from the point of origin in Canada to the point of destination in the Carolinas.[10] The Commission considered the assailed rates as being single units of charge for single units of transportation and disposed of the complaints in accordance with established precedents and existing law.

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[10] See *Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co.*, *supra*, at page 233.

SUMMARY OF ARGUMENT

I

The Interstate Commerce Commission is an arm of Congress, created for the purpose of administering the Interstate Commerce Act as amended. Its territorial jurisdiction reaches to the international boundary line where that of Congress itself halts. Its jurisdiction over rail carriers performing a transportation service within the boundaries of the United States is co-extensive with that of the Federal Government.

On international traffic moving from Canada to the United States the Act applies not only to the rail carriers rendering transportation service from the international boundary line, but also to the commodities being transported.

II

Under the Act it was, and is, the statutory duty of the appellee railroads to make and establish just and reasonable rates, which are not unduly preferential or unduly prejudicial, from the international boundary line to destinations in the United States. The appellees failed to make or publish any rates applicable on asbestos from the international boundary to destinations in the United States situate in either official territory or the Carolinas. This failure constituted a breach of their statutory duty, and compelled appellants to pay through charges which were unduly prejudicial to themselves and unduly preferential of their competitors located in official territory. The breach also permitted competitors to pay through charges which were unduly preferential to them and unduly prejudicial to appellants. Appellants were compelled to pay the through charges which were unjust and unreasonable.

The Act provides that "All charges made for any service rendered or to be rendered in the transportation of pas-

sengers or property * * * shall be just and reasonable * * *" (49 U. S. C. 1(5)); and makes it unlawful "* * * to make, give, or cause any undue or unreasonable preference or advantage to any * * * company, firm, corporation * * * in any respect whatsoever", or to subject them "* * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." (49 U. S. C. 3(1)). The appellee carriers were and are under a requirement to impose just and reasonable charges which are non-preferential or prejudicial for the transportation service rendered.

III

The Commission found that the appellee carriers, in lieu of establishing rates from the international boundary line to destinations in official territory, had since the turn of the century made and established single factor joint rates for application on asbestos for the use and benefit of appellants' competitors located in that territory. The Commission found that these single factor joint rates were unduly preferential to competitors and were unduly prejudicial to appellants. The Act expressly prohibits this unlawfulness (49 U. S. C. 3(1)).

The appellees and the District Court concede that the Commission had, and has, jurisdiction to determine the lawfulness of single factor joint rates applying from an origin in Canada to a destination in the United States. The complaints before the Commission put in issue the lawfulness of the rates from Canada to destinations in official territory. The Commission had jurisdiction to order removed any unlawfulness found to exist. Certainly it was within the power of Congress to prohibit the appellee carriers from practicing the discrimination found to exist. The Act does not authorize or forbid the making of single factor joint through international rate; however, it specifically prohibits the granting or causing to be granted "* * * any

undue or unreasonable preference or advantage to any particular person, company, firm, corporation. * * *". The Commission found that the appellees had violated this prohibition. Standing alone, without any consideration of the method of tariff publication of rates to the Carolinas, this statutory provision gives the Commission jurisdiction to order removed the unlawfulness found to exist.

Jurisdiction of the Commission to determine the lawfulness of an alleged preferred rate granted to competitors and the lawfulness of the alleged prejudicial rate assessed complaining shippers is inherent in section 3(1) of the Act (49 U. S. C. 3 (1)).

Further, the Commission had jurisdiction to determine the lawfulness under the Act (49 U. S. C. 3(1) of the through rates assessed appellants even though such rates were not published as single factor joint rates. The through charges assessed were made on a combination basis over East Alburgh and Newport, Vermont. The fact that these points are ports of entry is immaterial. The method of tariff publication is of no legal significance for the Act (49 U. S. C. 6(1)) recognizes that through transportation charges may be published as single factor joint rates or in the form of combination rates. The Commission has power to remove unjust discrimination in both classes of cases. See *United States v. Illinois Cent. R. Co.*, 263 U. S. 515. A through route existed and transportation was performed by virtue of an implied arrangement between the participating carriers.

The Commission found that the through charges assessed appellants were unduly prejudicial and unduly preferential of their competitors in official territory.

Unlawfulness was found to exist under the Act (49 U. S. C. 3(1)) in the rate adjustment to destinations in official territory and to destinations in the Carolinas. The discrimi-

nation was ordered removed and the appellee carriers required, insofar as transportation in the United States is concerned, to make and establish rates to Carolina destinations which would not exceed rates to Ambler, Pennsylvania, by more than certain designated differentials. This is not regulation of through rates from Canada to either official territory destinations or to Carolina destinations. It is regulation of the amount of the differential in rates which may exist between the rate adjustment made and maintained to Ambler, Pennsylvania, and that to the Carolinas. The appellee carriers are at liberty to revise the rate adjustment to Ambler and relate the Carolina adjustment thereto.

IV.

The Commission had jurisdiction to entertain the complaint and consider the reasonableness of the through rates assessed appellants. The complaints conformed with a fixed rule of the Commission, and of this Court, that where damages are claimed, the through transportation charges must be assailed and found unreasonable. The principle announced by the Court in *News Syndicate Co. v. New York Cent. R. Co.*, 275 U. S. 179; *Lewis-Simas-Jones Co. v. Southern Pac. Co.*, 283 U. S. 654; and *Great Northern Ry. Co. v. Sullivan*, 294 U. S. 458, controls disposition of the issue, in the instant case, relating to the jurisdiction of the Commission involving damages.

Insofar as damages are concerned "The shipper's only interest is that the charge shall be reasonable as a whole." This is true both as to domestic and international shipments. See *Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co.*, 269 U. S. 217; *News Syndicate Co. v. New York Cent. R. Co., supra; Lewis-Simas-Jones Co. v. Southern Pac. Co., supra; Great Northern Ry Co. v. Sullivan, supra;* and *E. A. Brown Produce Co. v. Atchison, T. & S. F. Ry. Co.*, 278 I. C. C. 433.

All rail carriers subject to the Act, participating in the assessment of unjust and unreasonable through charges, domestic or international, are joint tort-feasors. This is true whether the through charges are based on single factor rates, combination of proportional rates, combination of proportional and local rates, or combination of local rates. See *Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co., supra; News Syndicate Co. v. New York Cent. R. Co., supra; Lewis-Simas-Jones Co. v. Southern Pac. Co., supra; Great Northern Ry. Co. v. Sullivan, supra; and Atlantic & Y. Ry. Co. v. Carolina Button Corporation*, 74 F. (2d) 870.

V

The District Court erred in holding that the Commission's previous interpretation of the statute necessitated setting aside and annulling the orders entered in connection with decision of May 7, 1958.

The District Court draws no distinction between the Commission's previous administration of the Act as it relates to discrimination or as it relates to damages.

In the past the Commission has ordered removed unjust discrimination found to exist in rate adjustments involving through international rates made on a combination basis.

The District Court relied heavily on Commission decisions indicating that it did not have jurisdiction to entertain complaints which assailed through international rates, made combination over international border points, as being unjust and unreasonable (49 U. S. C. 1(5)), and prayed rates for the future, with a request for damages. The Commission's comments in the decisions cited by the District Court, insofar as they relate to damages, are erroneous as a matter of law.

The Commission decisions, for the most part, were rendered prior to this Court's decision in *Great Northern Ry. Co. v. Sullivan, supra.* Prior to that decision the Commission had applied different rules in determining damages incurred by shippers in connection with domestic shipments and international shipments. On domestic shipments the rule was, and still is, where reparation is prayed the complaint must assail the through transportation charge, regardless of whether combination rates are involved, and then found unreasonable. A different rule was applied on international shipments and this was to the effect that if a factor of the combination rate was beyond the jurisdiction of the Commission, the complaint had to be restricted to the domestic factor. This rule, of course, violated the principle that "The shipper's only interest is that the charge shall be reasonable as a whole." This Court in *Great Northern v. Sullivan, supra,* applied the rule in connection with international shipments.

Under the circumstances any comments made by the Commission relating to its jurisdiction in connection with international rates prior to the doctrine enunciated in the *Sullivan case, supra,* in 1935 must be closely scrutinized to determine the correctness thereof from a legal standpoint.

Errors of law committed by the Commission, or misinterpretations of the law by the Commission, is no bar to valid exercise of jurisdiction conferred by the Congress. As this Court stated in *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, at page 352: "Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise."

VI

The Commission has jurisdiction to consider the lawfulness of the proportional rate to East Alburgh and Newport, Vermont, for future application.

It can order the proportional rates cancelled and require the establishment of just and reasonable rates, free of discrimination, not only from the international boundary line to East Alburgh and Newport, Vermont, but also to destinations in the Carolinas.

These proportionals cover a transportation service rendered in the United States from the international boundary line to East Alburgh and Newport, Vermont. The tariffs on file with the Commission obligate the Canadian National Railway Company and the Quebec Central Railway Company to perform this transportation service. The Commission and the hearing examiner found that this service was substantial. By its very nature it is substantial for if this component part were not rendered, no through transportation service would be available from Canadian origins to destinations in the United States via East Alburgh and/or Newport, Vermont. This finding of substantial service cannot be disturbed by the judiciary unless unsupported by the record made before the Commission.

The District Court concedes that the Commission would have jurisdiction should either the Canadian National Railway Company or the Quebec Central Railway seek to discontinue service between the international boundary line and East Alburgh or Newport, Vermont, respectively; or should they seek to lease the trackage. The District Court held, however, that the Commission did not have jurisdiction over a rate applying in part for transportation service over these same tracks. The District Court says, "The issue here is whether the Commission has jurisdiction over certain rates, not whether the Commission has jurisdiction over the Canadian carriers." There is nothing in the Act which supports the distinction between Commission jurisdiction over tracks as against rate matters. There is no decision of a court of competent jurisdiction, or the Commission, which makes such a distinction.

The Commission would never consider proportional rates, which are in the nature of divisions, from the standpoint of damages for the through rate must be assailed and considered as a whole.

ARGUMENT

The questions presented herein relate to:

(a) The jurisdiction of the Commission to require the removal of undue preference and undue prejudice found to exist in an international rate adjustment covering asbestos and related commodities voluntarily established and maintained by rail carriers for application from mines in Quebec, Canada, to points in United States official territory and in the Carolinas; and

(b) The power of the Commission is to award damages when it found that the through transportation charges, constructed on a combination basis, assessed "Carolina Consumers" were unjust and unreasonable in the past.

The District Court restricted its consideration to a single question, which was: "Does the Commission have jurisdiction over the foreign factor of a combination international rate when the foreign factor is a proportional rate from the points of origin to a border interchange within the United States?" (R. 242) and then approached this case in the following manner:

> * * * plaintiffs here do not argue that the Commission's findings as to the unreasonableness and prejudicial character of the Quebec-Carolina rates were without substantial evidentiary basis if these rates are to be viewed as an indivisible entity. **Plaintiffs' argument before this court is confined to the contention that the Commission exceeded** [Fol. 291] **its power in failing to limit its jurisdiction to the local rate factor from the points of border interchange in Vermont southward to the Carolinas.** (R. 244-245.) (Emphasis supplied.)

It will be noted that the appellees' argument before the District Court was confined to the contention that the Commission had exceeded its power in failing to limit its jurisdiction to the local rates published by the participating carriers in the through transportation from East Alburgh and Newport, Vermont, to destinations in the Carolinas.

The District Court recognizes that the Commission has jurisdiction over single factor joint international rates (R. 246-247). Its action in annulling the Commission's orders was based solely on the proposition that the rates to the Carolinas were not single factor joint rates but rates made on a combination basis.[10a]

The fact that rates to the Carolinas are made on a combination basis is the result of the choice of the appellees' method of tariff publication. Section 6(1) of the Act (49 U. S. C. 6(1)) recognizes that the appellees had a perfect right to publish rates to the Carolinas in the form and manner chosen rather than as single factor joint rates.

Hence the District Court's interpretation places in the hands of the appellee carriers a tool whereby they can discriminate at will, or otherwise injure users of international transportation service, and defeat the main purpose of the Act.

[10a] The District Court's basic reason for this holding is the fact that the proportional rates applied on traffic interchange at the Vermont points, and that no interchange facilities were available at the international boundary line (R. 247). The Commission stated that it did not perceive how this would affect the situation since it had jurisdiction over the rail carriers to the extent that they operated within the United States (R. 75). This point is developed in detail hereinafter under Point VI, page 48.

I

THE INTERSTATE COMMERCE ACT APPLIES FROM THE INTERNATIONAL BOUNDARY LINE TO INTERIOR DESTINATIONS IN THE UNITED STATES

Sections 1(1)(a) and (2) of the Act (49 U. S. C. 1(1)(a) and (2)) relate to rail carriers subject to regulation and transportation subject to regulation. Insofar as international transportation is concerned these sections, in pertinent part, read as follows:

> "Carriers subject to regulation
>
> "(1) The provisions of this chapter shall apply to common carriers engaged in—
>
> "(a) The transportation of passengers or property wholly by railroad * * *
>
> * * *
>
> "* * * from or to any place in the United States to or from a foreign country, **but only insofar as such transportation * * * takes place within the United States.**
>
> "Transportation subject to regulation
>
> "(2) The provisions of this chapter shall also apply to such transportation of passengers and property * * * **but only insofar as such transportation * * * takes place within the United States.** * * *" (Emphasis supplied.)

These statutory provisions reflect the amendment made by Congress in the "Transportation Act," 1920 (36 Stat. 544, Feb. 28, 1920). In *International Nickel Co. v. Director General*, 66 I. C. C. 627, decided in 1922, at page 629, the Commission said:

> It is said that the amendments made by the transportation act, 1920, in section 1 of the act to regulate commerce, as amended, have changed or restricted the jurisdiction which was theretofore vested in us by that section. These amendments carry our territorial juris-

> diction up to the international boundary line, at which that of Congress itself halts. Our territorial jurisdiction as to foreign commerce is thus coextensive with that of the federal government. No act of Congress has force of law beyond that boundary line, but up to it, as everywhere else within the United States, the interstate commerce act has full effect just as the federal control act had effect when these shipments moved.

In *News Syndicate Co. v. New York Cent. R. Co., supra,* pp. 186-187,[11] decided in 1927, this Court, speaking through Mr. Justice Butler, held:

> The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York City, Section 1(1) and (2).

Prior to the amendment, insofar as it is here pertinent, section 1(1) (36 Stat. 544) declared that the Act applied from the United States to an adjacent foreign country.[12] In *Black Horse Tobacco Co. v. I. C. R. R. Co.*, 17 I. C. C. 588, decided in 1910, the Commission applied the same principle and rule of law as restated in *International Nickel Co. v. Director General, supra.*

The Commission has on numerous occasions either declared its power to require, or entered orders requiring, carriers operating in the United States to remove undue preference and undue prejudice found to exist in international rate adjustments; and in addition, has awarded damages where it appeared that the rail carriers had partici-

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[11] Followed and restated by this Court in *Lewis-Simas-Jones Co. v. Southern Pac. Co., supra,* decided in 1931.

[12] This Court in *Galveston, H. & S. A. Ry. Co. v. Woodbury,* 254 U. S. 357 (1920), a case decided under section 1(1) (49 U. S. C. 1(1) as it existed prior to the 1920 Amendments, held that transportation from an adjacent foreign country to the United States was within the Commission's jurisdiction under the provision relating to the transportation from the United States to an adjacent foreign country.

pated in the assessment of unjust and unreasonable through transportation charges.[18]

It is clear that the various provisions of the Act, as amended, apply not only to the rail carriers rendering transportation service from the international boundary line, but also to the commodities being transported.

The District Court correctly held that the Act applied to the Canadian National Railway Company and the Quebec Central Railway Company if any attempt was made to either abandon or lease any portion of the rail trackage situate in the United States between the international boundary line and East Alburgh and Newport, Vermont, respectively. The District Court erroneously held that the Act did not apply to the rates maintained by these carriers over the trackage situate in the United States. There is nothing in the Interstate Commerce Act or in any judicial authority for the distinction made by the District Court. This subject is discussed in detail hereinafter under Point V beginning with page 44.

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[18] *Rates on Soda Ash and Other Commodities*, 28 I. C. C. 613; *International Paper Co. v. D. & H. Co.*, 33 I. C. C. 270, 274; *Carey Mfg. Co. v. G. T. W. Ry. Co.*, 36 I. C. C. 203, 206; *United Paperboard Co. v. C. N. Rys.*, 74 I. C. C. 733, 737; *Washington Publishers' Assn. v. B. & O. R. R. Co.*, 98 I. C. C. 339; *Spanish River Pulp & Paper Mills v. A. & W. Ry. Co.*, 113 I. C. C. 343, 350; 120 I. C. C. 251; *Tennessee Extract Corp. v. L. & N. R. R. Co.*, 128 I. C. C. 709, 713; *Peters-Duncan v. D. M. & V. R. R. Co.*, 144 I. C. C. 55, 58; *Sand and Gravel from Canada*, 83 I. C. C. 460; *Newsprint Paper from Eastern Canada*, 109 I. C. C. 701; *Newsprint and Wall Paper*, 126 I. C. C. 166.

II

UNDER THE ACT IT WAS THE STATUTORY DUTY OF THE APPELLEE RAILROADS TO ESTABLISH JUST AND REASONABLE RATES FROM THE INTERNATIONAL BOUNDARY LINE FOR APPLICATION ON ASBESTOS TO DESTINATIONS IN THE UNITED STATES.

Section 1(5) of the Act (49 U. S. C. 1(5)) clearly states:

> All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 6(1) and (7) of the Act (49 U. S. C. 6(1) and (7)) requires publication of rates to be charged for transportation services rendered; and the filing of appropriate tariffs with the Commission.

In *International Nickel Co.* v. *Director General*, (1922), *supra*, the Commission considered a complaint which alleged that the joint rates assessed on shipments of blister copper from Port Colborne, Ontario, Canada, were unjust and unreasonable and prayed reparation. The complaint was sustained and reparation granted. At page 628 of 66 I. C. C. the entire Commission stated that "the charging of an unreasonable rate is a tort" and that all carriers participating in the rate were jointly and severally liable for any resulting damage. The Commission referred to the provisions of sections 1(5) and 8 of the Act (49 U. S. C. 1(5) and 8) and concluded as follows:

> American lines parties to a joint rate from or to a point in Canada, the charges under which are unreasonable, "cause to be done" or "do" a thing (*i. e.*, the collection of unreasonable charges for the transporta-

tion of property) "prohibited and declared to be unlawful" by the act, and are "liable to the person or persons injured thereby for the full amount of the damage sustained."

The rule of law announced by the Commission in *International Nickel Co. v. Director General, supra*, has been approved and affirmed by this Court. In *News Syndicate Co. v. New York Cent. R. Co., supra*, page 187, it is stated:

> It was the duty of defendants in error to establish just and reasonable rates for that service. Section 1(5); section 6(1) and (7). They failed to make or publish any rate applicable to that part of the transportation. Section 8 makes them liable for damages sustained in consequence of such failure. Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error.

The Court in the above statement was referring to the service rendered, and the transportation performed, from the international boundary line to New York City.

In *Lewis-Simas-Jones Co. v. Southern Pac. Co., supra* (1931), this Court restated the principle of law enunciated in *News Syndicate Co. v. New York Cent. R. Co., supra*.

Under the Act it was the duty of the rail carriers, in the instant case, to establish just and reasonable rates from the international boundary line which would not be unduly preferential or unduly prejudicial; and to comply with all other provisions of the Act relating to the transportation service performed, and the commodity transported.

The appellees failed to make or publish any rate applicable on asbestos from the international boundary to either official territory or Carolina destinations. This failure constituted a breach of their statutory duty. Notwithstanding their failure to publish rates for this part of the transportation service, they were still under a requirement

to impose just and reasonable rates for the service rendered (49 U. S. C. 1(5)).

III

THE COMMISSION HAD JURISDICTION TO DETERMINE THE LAWFULNESS OF THE SINGLE FACTOR JOINT RATES TO DESTINATIONS IN OFFICIAL TERRITORY AND THE THROUGH RATES MADE ON A COMBINATION BASIS TO CAROLINA DESTINATIONS UNDER SECTION 3(1) OF THE ACT (49 U. S. C. 3(1))

In *State of New York v. United States*, 331 U. S. 284, decided May 12, 1947, this Court, speaking through Mr. Justice Douglas, at page 296 stated: "The principal evil at which the Interstate Commerce Act was aimed was discrimination in its various manifestations." See also: *Texas & P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197; *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361; *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Interstate Commerce Com. v. Chicago, R. I. & P. R. Co.*, 218 U. S. 88; *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467.

In *Houston, E. & W. T. R. Co. v. United States*, 234 U. S. 342 (1914), this Court, speaking through Mr. Justice Hughes, in interpreting the language used by the Congress in section 3 of the Act (49 U. S. C. 3) at page 356, said:

> This language is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn.

In *Castle v. Baltimore & O. R. Co.*, 8 I. C. C. 333, 345, decided in 1899, the Commission, speaking through Mr. Commissioner Yeomans, stated:

> Common carriers are bound by every principle of justice and of law to accord equal rights to all shippers who are entitled to like treatment, both in the re-

ceiving of supplies and shipment of their products; and a carrier who under any pretext whatsoever grants to one shipper an advantage which it denies another violates the spirit and thwarts the purpose of the law.

In *Carey Mfg. Co. v. G. T. W. Ry. Co.*, 36 I. C. C. 203,[14] decided by the Commission in 1915, a complaint was considered which alleged that through rates assessed on asbestos sand in carloads from Robertson, Thetford, and Sherbrooke, Quebec, Canada, to Lockland and Rockdale, Ohio, made on combination basis, subjected the complainants to unjust discrimination in favor of competitors, located at Chicago, Illinois, and Milwaukee, Wisconsin, who were assessed single factor joint rates. The Commission sustained the complaint and entered the necessary statutory finding of fact required by the Act (49 U. S. C. 3(1)):

> Upon consideration of all the facts shown of record, we are of the opinion, and find, that the rates complained of have been, are, and for the future will be, unjustly discriminatory against complainants in so far as the rates to Lockland or Rockdale exceeded or exceed the rates contemporaneously maintained from the same points to Chicago or Milwaukee.

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[14] The Commission held that it could not prescribe joint through rates from Canada to points in the United States but that it could control the rates which the American lines charged from the "ports of entry" in the United States to destinations in the United States whether such rates were joint rates or separately established rates applicable to the through transportation. The Commission further stated that its jurisdiction attached at the "ports of entry" and that as a result it could pass upon the complaint of unjust discrimination as if the traffic in question originated at Detroit and Port Huron, Michigan. The Commission stated that if its statutory finding of fact was not complied with that it would enter an order requiring the rail carriers subject to its jurisdiction to establish, in lieu of the present rates, joint and local rates from the "ports of entry" which would be no higher to Lockland or Rockdale than to Chicago or Milwaukee. (From research it appears the Commission has never used the phrase "ports of entry" again in connection with its jurisdiction.) In *Newsprint Paper to Detroit*, 161 I. C. C. 637, decided by Division 5, in 1930, jurisdiction was exercised over rates on newsprint paper from Canadian points to Detroit when it was found that the carriers had failed to establish a rate from the international boundary line, which was the middle of the Detroit River, and cited *News Syndicate Co. v. New York Cent. R. Co.*, *supra* (1927). Detroit and Port Huron are "ports of entry."

In *Cyanamid and Cyanide From Niagara Falls*, 155 I. C. C. 488, decided in 1929, the Commission investigated the lawfulness of certain proposed increased joint rates on cyanamid and crude cyanide, in carloads, from Niagara Falls, Ontario, Canada, to destinations in eastern trunk-line and New England territories, Cincinnati, Ohio, and Virginia cities. The American Cyanamid Company protested the proposed increases and requested the Commission to suspend the increases and institute an investigation as to the lawfulness of the proposed increases. The Commission's suspension and investigatory powers under the Act are conferred by section 13(2) (49 U. S. C. 13(2)). The Commission suspended the proposed increases and entered into an investigation as to their lawfulness. The statutory finding of fact entered by the Commission at page 500 of its decision reads as follows:

> We find that the suspended schedules and concurrences have not been justified. An order will be entered requiring their cancellation and discontinuing this proceeding, without prejudice, however, to the filing of new schedules and concurrences in conformity with the views expressed herein.

The inevitable question of jurisdiction was raised. The carriers participating in the proposed increased joint rates challenged the Commission's jurisdiction to suspend the proposed international joint rates. The Commission held that it had power to suspend the schedule carrying the proposed increased rates and found that the proposed increases had not been justified under the Act.

In *Consolidated Mining & S. Co. of Canada v. N. Y. C. R. Co.*, 299 I. C. C. 231, decided by Division 2 in 1956, it was held that under section 3(1) of the Act the Commission had jurisdiction to determine the lawfulness of through rates made on a combination basis over Chicago, or Chicago junctions, applicable on pig lead and slab zinc from Tadanac,

British Columbia, Canada, to eastern destinations. It was found that the assessed rates were unduly prejudicial to complainants and that the single factor joint rates assessed competitors operating in western United States and enjoying single factor rates to eastern destinations had been unduly preferred. The unlawful discrimination was ordered removed.

Thus in the past the Commission has exercised jurisdiction over international through rates, be they single factor rates, or rates made on a combination basis, and required the removal of unlawful discrimination found to exist.

Appellees, when before the Commission, argued that the Commission was without jurisdiction to order the removal of any undue preference or undue prejudice which might exist in the international rate adjustment on asbestos from Canadian origins to destinations in official territory and in the Carolinas. Their argument was predicated solely on the fact that the through rates assessed to the Carolina destinations were made on a combination basis over the "ports of entry" of East Alburgh and Newport, Vermont, and such ports for all practical purposes should be considered as the international boundary line. The argument was rejected by the Commission.

The argument overlooks entirely the fact that the single factor joint rates to official territory were brought in issue as being violative of the Act (49 U. S. C. 3(1)). The Commission specifically held: "It is clear that the complainants' competitors at Ambler and other destinations in official territory are being unduly preferred to the undue prejudice and disadvantage of the complainants * * *" (R. 76).

The Act (49 U. S. C. 3(1)) specifically prohibits the granting or causing to be granted "* * * any undue or unreasonable preference or advantage to any particular per-

son, company, firm, corporation * * *", *a fortiori*, the Commission has power to order the discrimination removed. The issue with respect to single factor joint rates to official territory is one of undue preference and prejudice. The Commission's power to order it removed has been exercised a number of times. See *Inland Empire Paper Co. v. Great Northern Ry. Co.*, 219 I. C. C. 501, 511.

In *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 43 Fed. Rep. 37, decided in 1890, affirmed by this Court in 1892 in *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, it is stated that the language used in section 3 of the Act (49 U. S. C. 3) was both in the affirmative and negative and involved the element of comparison of one service and charges with others similarly situated and circumstanced. At page 47 it is stated:

> Persons in like situations, requiring or desiring like and contemporaneous service on the part of carriers, were to be treated, in the matter of rates, impartially. This is expressed both affirmatively and negatively in the language of section 3. The carrier shall not give any undue or unreasonable preference or advantage to or in favor of any particular person, company, or traffic, nor subject any particular person, company, or traffic to any undue or unreasonable prejudice or disadvantage. These words necessarily involve the idea or element of comparison of one service or traffic with another similarly situated and circumstanced, and require that, to be undue and unreasonable, the preference or prejudice must relate and have reference to competing parties, producing between them unfairness and an unjust inequality in the rates charged them respectively for contemporaneous service under substantially the same circumstances and conditions. In determining the question whether rates give an undue preference or impose an undue prejudice or disadvantage, consideration must be had to the relation which the persons or traffic affected bear to each other

and to the carrier. When and so long as their relations are similar or "substantially" so, the carrier is prohibited from dealing differently with them in the matter of charges for a like and contemporaneous service.

We turn now to the through rates assessed to the Carolinas which were made on a combination basis. The Commission found that these rates were "unduly prejudicial to complainants and unduly preferential of the complainants' competitors in official territory * * *" (R. 77).

Undue prejudice may be inflicted as effectively by a through rate made on combination basis as by a joint rate.[15] Such a distinction would be without legal significance since the Commission has power to remove unjust discrimination in both classes of cases. This was settled in *United States v. Illinois Cent. R. Co., supra*, decided in 1924, when, speaking through Mr. Justice Brandeis, this Court stated at page 527:

> * * * The rate to the short line points is not a joint rate, but a combination of the trunk line rate to the junction and the short line local rate. The distinction is without legal significance in this connection. A through route was established; and the transportation is performed as the result of this arrangement between the carriers, express or implied.[9] Undue prejudice may

[15] The District Court erred in distinguishing as follows:

> The rates the Commission found unreasonable and prejudicial in the present case, however, were not joint rates, but were combination rates. (R. 247.)

The District Court also erred in holding that the Commission should have made findings as to transportation charges for that tansportation service rendered in the United States (R. 248). Appellees published no rates from either the international boundary line or from East Alburgh and Newport to destinations in official territory. Single factor joint through rates were assessed. The form of tariff publication employed by appellees made it impossible for the complainants or the Commission to deal with rates from the boundary line under section 3(1) of the Act (49 U. S. C. 3(1)).

If rates were maintained by the appellees from the international boundary line to destinations in official territory and destinations in the Carolinas, then the burden was on them to say what they were and where they could be found. This they did not do. See *Lewis-Simas-Jones Co. v. Southern Pac. Co., supra.*

be inflicted as effectively by a through rate which is a combination of locals, as by a joint through rate. The power of the Commission to remove the unjust discrimination exists in both classes of cases. See *St. Louis Southwestern Ry. Co. v. United States*, 245 U. S. 136, 139, note 2, 38 Sup. Ct. 49, 62 L. Ed. 199.

In note 2 described in reference 9 above this Court referred to the decision of the Commission in *Through Routes and Through Rates*, 12 I. C. C. 163, which was decided by the Commission in 1907. This decision is a landmark in interstate commerce law. It not only dealt with through routes and through rates but also with the duties and obligations of the rail carriers with respect to the publication of rates and charges required by the Act. It was in this case that the Commission emphasized that a through route is a **unit** of service and the rate assessed for the **unit** of service was likewise a **unit**. For ready reference the following excerpts taken from page 166 of 12 I. C. C. are submitted:

> A through route is a continuous line of railway formed by an arrangement, express or implied, between connecting carriers. It must have a rate for every service it offers, and, **as the route is a new unit**—one line formed of two or more connecting lines—**so its rate for every service is a unit**, even though it be divided between the several carriers arranging themselves into the through route. As was said by the Commission in *Brady v. P. R. Co.*, 2 I. C. C. Rep., 131, "through carriage implies **a through rate**." This is equally true whether the through rate be published as a whole by the joint action of the connecting carriers, or, in the absence of a joint arrangement, be published in portions by the several carriers. The route being one, **a charge for a service over it is a charge for a single service**, all the terms of which must be fixed at one and the same time; that is, at the time the initial carrier enters into the engagement for the service. The rate is either a joint through rate made by arrangement by the par-

ties to the through route, or it is a combination through rate consisting of "the separately established rates, fares, and charges applied to the through transportation." **This sum, however, is a single rate for a single service,** and a contract for through transportation is a contract for transportation at the through rate, whether jointly or separately established, in force at the time the shipment is billed. (Emphasis supplied.)

In 1952 this Court dealt with the subject matter in *Thompson v. United States*, 343 U. S. 549, pp. 556-557, which states:

> * * * The statutory term "through route," used throughout the Interstate Commerce Act, has been defined by this Court as follows:
>
> > "A 'through route' is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. **Through carriage implies a 'through rate.'** This 'through rate' is not necessarily a 'joint rate.' It may be merely an aggregation of separate rates fixed independently by the several carriers forming the 'through route'; **as where the 'through rate' is 'the sum of the locals' on the several connecting lines** or is the sum of lower rates otherwise separately established by them for through transportation. **Through Routes and Through Rates,** 12 I. C. C. 163, 166". * * *
>
> In short, the test of the existence of a "through route" is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service. (Emphasis supplied.)

In the instant case there is no question as to the existence of a "through route" nor "whether the participating carriers held themselves out as offering through transportation service." It must be conceded by appellees that

through routes exist from the Canadian origins to the Carolina destinations, and that for many years the appellees have held themselves out to render a through transportation service, and in fact have handled many thousands of cars of asbestos to the Carolinas under the through rates constructed on a combination basis.

The Canadian National Railway and Quebec Central Railway, as originating carriers, issued the bills of lading, collected the through transportation charges from the asbestos producers in Canada, who in turn billed the "Carolina Consumers" for the said charges. All of the terms and conditions of the contract of through carriage were entered into at one and the same time. These Canadian carriers acted in their own behalf and as agents for the other carriers participating in the through transportation. *Through Routes and Through Rates, supra.*

It cannot be argued that the Commission was without jurisdiction to determine the issues under section 3(1) of the Act (49 U. S. C. 3(1)) because single factor joint rates were assessed competitors in official territory, whereas combination rates were assessed "Carolina Consumers". No such argument could be made meritorious on the ground that in the case of the single factor joint rates an express agreement was involved, whereas in the case of combination rates express agreement was lacking. In the case of combination rates the agreement was implied. This matter was well settled even before this Court's decisions in *St. Louis Southwestern Ry. Co. v. United States*, 245 U. S. 136, 139, decided in 1917; *United States v. Illinois Cent. R. Co., supra*, decided in 1924; and *Thompson v. United States, supra*, decided in 1952.

In *Kansas City S. R. Co. v. C. H. Albers Com. Co.*, 223 U. S. 573, decided in 1912, at pages 597 and 598, this Court, speaking through Mr. Justice Van Devanter, said:

"If an initial carrier accepts traffic for transportation and issues its bill of lading over a route made up of connecting roads for which no joint through rate has been published and filed with the Commission, the lawful rate to be charged is the sum of the established local rates published and filed by the individual roads; or if, as was the case here, there is a local rate over one road and a joint rate over the others for the remainder of the route, all published and filed with the Commission, the lawful through rate to be charged is the sum of the local and joint rates. By failing to establish or concur in a joint through rate for traffic accepted for interstate transportation, **each participating carrier impliedly asserts that the rate which it has duly established, published, and filed for its own line shall be a component part of the through rate to be charged.** It is competent for carriers, if conditions justify it, to make their proportions of a through rate less than the local charges upon their own lines, but in doing so they should observe legal methods, and if no action to that end is taken, they in effect adhere to the rates established, published, and filed by them as applying not only to local but through traffic." (Emphasis supplied.)

It may be argued that the Commission did not have jurisdiction to order the unlawful discrimination removed because international rates are involved and the Commission is not empowered to regulate such rates. Such an argument would be unsound for two reasons: (1) In the instant case the Commission required the unlawful discrimination be removed through the requirement that rates to the Carolina destinations should not exceed by more than certain designated amounts the rates published and maintained to Ambler, Pennsylvania. As stated, its order of March 11, 1959 (R. 225-226), dispelled any doubt that the method of adjusting rates to remove the unlawful discrimination found to exist was left to the option of the rail carriers. This is regulation of the amount of the differential which

can exist between rates to Ambler, Pennsylvania, and to the Carolina destinations. It is not regulation of through rates from Canada to either official territory destinations, such as Ambler, or to Carolina destinations, such as Charlotte. (2) Freedom from regulation of through transportation charges from Canadian origins to destinations in the United States does not imply that the appellees can discriminate at will.

In *St. Louis, B. & M. Ry. Co. v. Brownsville Nav. Dist.*, 304 U. S. 295, decided May 16, 1938, this Court was called upon to consider whether, under the 1920 act, there was a duty on the part of American railroads to furnish cars for transportation on a Mexican railroad. It was there held that American railroads could not discriminate against shippers, places, or classes of traffic within the United States even though they were under no duty to furnish cars for transportation on a Mexican railroad. The exact words of this Court at page 300 were as follows:

> * * * Petitioners are not bound by any law, regulation, or tariff to furnish cars for transportation in Mexico. But that freedom from obligation does not imply that, in furnishing equipment for transportation beyond the boundary, petitioners may unreasonably discriminate between shippers, places, or classes of traffic within the United States. Cf. *Lewis, etc., Co. v. Southern Pac. Co.*, 283 U. S. 654.

IV

THE COMMISSION HAD JURISDICTION TO DETERMINE THE REASONABLENESS OF THE THROUGH RATES ASSESSED APPELLANTS UNDER SECTION 1(5) OF THE ACT (49 U. S. C. 1(5)) FOR THE PURPOSE OF AWARDING DAMAGES

Upon proper complaint the jurisdiction of the Commission to determine the reasonableness of international

through rates applicable over through routes under section 1(5) of the Act (49 U. S. C. 1(5)) for the purpose of awarding damages as authorized by sections 8 and 16(1) of the Act (49 U. S. C. 8 and 16(1)) is beyond question.

In the instant case the complaints before the Commission challenged the assessed through transportation charges, alleged that they were unjust and unreasonable, and prayed damages. This conformed with a fixed rule of the Commission, and of this Court, that where damages are claimed, the through transportation charges must be assailed and found unreasonable.

In *News Syndicate Co. v. New York Cent. R. Co.*, *supra*, this Court considered a failure of rail carriers to comply with the statutory duty imposed by the Act to establish just and reasonable rates from the international boundary line to New York City for application on paper. The shipments originated at Thorold, Ontario, Canada, and moved over through routes to New York City. This failure constituted a tortious act but "Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error." *News Syndicate case*, *supra*, p. 187.

In the instant case the District Court refused to apply the principle enunciated in the *News Syndicate case*, *supra*, because the through rates were made on a combination basis. This Court in *Great Northern Ry. Co. v. Sullivan*, *supra*, held that the principle announced in *News Syndicate Co. v. New York Cent. R. Co.*, *supra*, and *Lewis-Simas-Jones Co. v. Southern Pac. Co.*, *supra*, controlled disposition of a case which involved through rates made on a combination basis.

In *Great Northern Ry. Co. v. Sullivan*, *supra*, the essential facts were as follows. Certain parties filed complaints with the Commission and alleged that the proportional rates assessed by the Great Northern Railway Company, and other American carriers, from the international bound-

ary line, were unjust and unreasonable in violation of the Act (49 U. S. C. 1) and prayed the establishment of reasonable maximum American proportionals, for future application, and reparation on past shipments. The through rates, made on a combination basis, were not assailed, and neither was the Canadian Pacific proportional which constituted one factor of the through rate. The Commission found that the assailed proportional rate maintained by the Great Northern Railway Company, and other American carriers, was unjust and unreasonable, and awarded reparation. Thus there was a finding by the Commission that the Great Northern Railway Company and other American carriers had committed a tortious act in that they had established and maintained unjust and unreasonable rates from the international boundary to the interior destinations in the United States in violation of the Act (49 U. S. C. 1(5)). This tortious act was comparable to the tortious act committed in the *News Syndicate Company case, supra,* by the carriers there involved in failing to establish just and reasonable rates from the international boundary line for application on paper to New York City. In both cases this Court held that there had to be a further tortious act committed in connection with the through transportation charges actually assessed before the Commission had jurisdiction to make an award of damages under sections 8 and 16(1) of the Act (49 U. S. C. 8 and 16(1)).

In the *News Syndicate Company case, supra,* the order of the Commission awarding damages was sustained because there the **through rate** had been assailed and found unjust and unreasonable.

In the *Great Northern Ry. Co. v. Sullivan case, supra,* the order of the Commission was **not sustained** because "There being no claim or finding to the contrary, the charges collected on the shipments must be deemed to have

been just and reasonable." This Court further pointed out that the Commission under the Act (49 U. S. C. 1) has power to determine the reasonableness of one factor of a through rate assessed over a through route without determining whether its "application has resulted or will result in pecuniary loss or damage to the shipper." The Court further stated that the Commission may determine whether a proportional rate constituting one factor of a through rate violates the Act (49 U. S. C. 1), as to the future, without passing upon the validity of the rate as a whole, and cited *Atchison, T. & S. F. Ry. Co. v. United States*, 279 U. S. 768, 776. It is significant that this Court in holding that "the Commission may not order or permit payment of damages by way of reparation without finding that the amount of the charge was unjust and unreasonable" cited in support thereof *News Syndicate Co. v. New York Cent. R. Co.*, *supra*, page 187. This can only mean that the same legal principle which applies to single factor joint international rates, insofar as reparation is concerned, applies also in connection with through international rates made on a combination basis.

In the instant case the complainants before the Commission assailed the through transportation charges assessed on asbestos originating in the province of Quebec and destined to Carolina points, as being unlawful under the Act (49 U. S. C. 1(5)) and prayed damages in the form of reparation.

The deficiencies pointed out by this Court in *Great Northern Ry. Co. v. Sullivan*, *supra*, do not exist in the case at bar.

The salient legal principle announced by this Court in the *News Syndicate Company case*, *supra*, *Lewis-Simas-Jones case*, *supra*, and *Great Northern Ry. Co. v. Sullivan*,

supra, is to the effect that "the shipper's only interest is that the charge shall be reasonable as a whole."

In the landmark decision of this Court dealing with the powers of the Commission to make an award of damages this Court said: "The shipper's only interest is that the joint rate be reasonable as a whole." *Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co., supra* (1925). In the cited case the authority of the Commission to make an award of reparation in connection with domestic interstate shipments was being considered.

It may be argued that this basic principle announced by this Court in 1925 is not applicable when a question of reparation is involved in connection with through international shipments. Such an argument, if made, would be without merit. In *News Syndicate Co. v. New York Cent. R. Co., supra* (1927), this Court applied the principle when it stated that: "Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error". In *Great Northern Ry. Co. v. Sullivan, supra*, p. 463, it is stated: "The shipper's only interest is that the charge shall be reasonable as a whole." In both the *News Syndicate Company case, supra*, and in the *Great Northern Ry. Co. v. Sullivan case, supra*, which involved international rates, this Court cited in support of the stated principle its previous holding in *Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co., supra.*

In finding the through rates on asbestos from Canadian origins to Carolina destinations unjust and unreasonable, and awarding damages, the Commission administered the Act according to a fixed rule which it laid down in 1916 in *Stevens Grocer Co. v. St. L., I. M. & S. Ry. Co.*, 42 I. C. C. 396. It was stated at page 398:

> * * * It is important that the true rule be definitely announced and that a **uniform policy be established un-**

der which parties complainant and defendant may understand what is required. We now lay down the rule, which for the future will be strictly adhered to, that when a complaint involves charges applicable to a through shipment the through rate or charge must be brought in issue and the participating carriers must be made defendants. When the through rate or charge is made up of separately established rates or charges, applicable to the through business, **the through rate or charge must be attacked as violative of the act**, although the violation may be believed to be occasioned by a particular factor or factors thereof; in such case the complainant should be prepared at the hearing to prove the unlawfulness of the through rate itself and that this is due to a particular factor or factors. (Emphasis supplied.)

In *Cairo Board of Trade v. C., C., C. & St. L. Ry. Co.*, 46 I. C. C. 343, decided in 1917, the Commission reaffirmed the principle stated in the *Stevens Grocer Co. case, supra*, but modified it insofar as rates for the future are concerned.

The modified principle was restated in 1929 by the Commission in *Atlantic Terra Cotta Co. v. Atlanta & W. P. R. Co.*, 151 I. C. C. 45 at page 52:

> In *Cairo Board of Trade v. C., C., C. & St. L. Ry. Co.*, 46 I. C. C. 343, 350, we announced a principle, **which has since been consistently followed, that where a through rate is made up of separately established components** we may pass upon the lawfulness of any one of the components independent of the others for the future, **but where the matter of reparation on past shipments is concerned the total through charges must be considered.** This principle is applicable here and necessitates separate consideration of the rates in the past and for the future. (Emphasis supplied.)

In *Alberta Coal Sales Co. v. C. N. Rys.*, 142 I. C. C. 543, decided in 1928, the Commission was considering a complaint which had **assailed only the proportional** rate ap-

plied from the international boundary as being unjust and unreasonable and prayed reparation. The Commission departed from the principle announced in 1916 in the *Stevens Grocer Co. v. St. L., I. M. & S. Ry. Co., supra*, relating to damages and condemned the proportional rate applicable on coal from the international boundary to interior destinations in the western part of the United States, and awarded damages.

Evidently the Commission was of the opinion that the rule of law governing the disposition of complaints seeking reparation in connection with domestic interstate shipments did not apply when international shipments were involved. Reparation was granted even though the through rate had not been assailed and even though the through rate had not been found unreasonable. Commissioner Brainerd dissented on this point and at page 548 of 142 I. C. C. he stated:

> * * * A through rate may be reasonable, although one of its elements is not. **It is immaterial that the through rate be a combination of locals or proportionals rather than a joint rate.** In the ascertainment of damages, the commission has jurisdiction to determine the reasonableness of the through rate. The through rate being reasonable, no damage can have resulted therefrom to the complainant. *News Syndicate Co. v. N. Y. C. R. R. Co.*, 275 U. S. 179, 187. (Emphasis supplied.)

In *Great Northern Ry. Co. v. Sullivan, supra*, this Court reviewed the Commission's decision in *Alberta Coal Sales Co. v. C. N. Rys., supra*, and held that the Commission was without jurisdiction to award damages since the through rate had not been assailed and found unreasonable. The Court reiterated its language in *News Syndicate Co. v. New York Cent. R. Co., supra*, with regard to the necessity of finding that the through transportation charges assessed were unjust and unreasonable in violation of the Act (49 U. S. C. 1(5)) before damages could be awarded.

It is firmly established that the Commission's jurisdiction to award damages in the form of reparation is the same whether the shipments involved are **domestic or international.**[16] In the instant case the Commission's decision of May 7, 1958, recognized and applied the fixed rule of law governing damages and entered specific findings of fact to support the action taken.

It may be argued that appellants, "Carolina Consumers", should have restricted their complaint before the Commission to allege **only that the local rates** from East Alburgh and Newport, Vermont, to Carolina destinations, were unjust and unreasonable in violation of the Act (49 U. S. C. 1(5)). Such an argument would be without merit, for as shown above, this Court and the Commission has consistently held that **insofar as reparation is concerned** the through rate must be assailed and found unreasonable by the Commission before reparation can be awarded.[17]

The appellees in constructing the assailed through rates assessed, added the local rates from East Alburgh

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[16] In *E. A. Brown Produce Co. v. Atchison, T. & S. F. Ry. Co., supra,* decided in 1950, at page 436 it stated:

> . . . *Whether the movement is domestic or international, the through charge to the shipper,* and not divisions of the joint through rate *nor the individual factors composing a combination rate,* is what determines the reasonableness of the through rate. See *Great Northern Ry. v. Sullivan, supra,* wherein, in annulling an award of reparation of this Commission based upon a finding of unreasonableness in the domestic factor of an international combination rate, the Court said: "The shipper's only interest is that the charge shall be reasonable as a whole." (Emphasis supplied.)

[17] The District Court criticized the Commission for failing " . . . to distinguish between that portion of the charge covering the transportation which took place in the United States and that portion covering the transportation within Canada." (R. 248.) This was not justified. The cause of action is founded on the commission of two torts: (1) Failure to establish just and reasonable rates from the international boundary line to the Carolina destinations; and (2) participating in the assessing of unjust and unreasonable through rates from the Canadian origins to the Carolina destinations which was a violation of section 1(5) of the Act (49 U. S. C. 1(5)). Commission of the tort embraced within (2) gave the Commission jurisdiction to determine the damages sustained by "Carolina Shippers." See *News Syndicate Co. v. New York Cent. R. Co., supra.*

and Newport, Vermont, to Carolina destinations to the proportional rates from the Canadian origins to East Alburgh and Newport, Vermont. These proportional rates are nothing but a part of a through rate, for they cannot be used in any other capacity. The appellees' use of their local rates from East Alburgh and Newport, Vermont, to the Carolina destinations were also but parts of the through rate assessed and their use as such was impliedly agreed to by the appellees performing that part of the transportation service south of the **Vermont** points. In *Kansas City S. R. Co. v. C. H. Albers Com. Co., supra*, decided in 1912, discussed herein at pages 32 to 33, this Court made it plain that under such facts and circumstances the participating carriers in the through transportation service who established and maintained the local rates from East Alburgh and Newport impliedly asserted that such rates "shall be a component part of the through rate to be charged."

Had the complainants before the Commission restricted their complaints, insofar as reparation is concerned, to an allegation that these local rates from East Alburgh and Newport, Vermont, to the Carolina destinations were unjust and unreasonable, and had the Commission found such rates were unjust and unreasonable under the Act (49 U. S. C. 1(5)), **still it would not have had jurisdiction to determine and award damages**, for that tort, standing alone, would not have been sufficient to give the Commission jurisdiction to award damages. The through rate would still have to be passed on and found unreasonable before such jurisdiction attached. See *News Syndicate Co. v. New York Cent. R. Co., supra; Great Northern Ry. Co. v. Sullivan, supra.*

The District Court interpreted *Great Northern Ry Co. v. Sullivan, supra*, as relating to proof of unreasonableness of the through rate rather than as a jurisdictional question

(R. 252). The District Court erred. The fixed rule requires that the through rate be assailed and found unreasonable by the Commission before jurisdiction attaches giving the Commission power to then determine damages flowing from the tortious act—which was the active participation in assessing through rates and charges in violation of the Act (49 U. S. C. 1(5)).

One of the principal grounds relied on by the District Court in holding that the proportional rates from the Canadian origins to East Alburgh and Newport, Vermont, were not subject to the jurisdiction of the Commission will be found in the following statement (R. 249):

> Second, if the Commission's action in the present case were approved by us it would follow that in situations where the foreign factor is the unreasonable factor American carriers will be held liable for a portion of overcharges that they had no part in formulating.

From this statement it is obvious that the District Court has completely ignored the law of joint tort feasor liability as it relates to the question of damages. It is just such participation by the carriers in the assessment of unjust and unreasonable through transportation charges which makes them liable as joint tort-feasors. See *Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co., supra; News Syndicate Co. v. New York Cent. R. Co., supra; Lewis-Simas-Jones Co. v. Southern Pac. Co., supra; Great Northern Ry. Co. v. Sullivan, supra;* and *Atlantic & Y. Ry. Co. v. Carolina Button Corporation, supra.*

It is submitted that under the facts and circumstances of this case and under the pleadings before the Commission —the Commission had jurisdiction to determine the reasonableness of the through rates assessed "Carolina Consumers" and award damages for violation of the Act (49 U. S. C. 1(5)).

V

THE DISTRICT COURT ERRED IN HOLDING THAT THE COMMISSION'S PREVIOUS INTERPRETATION OF THE STATUTE AS IT RELATES TO INTERNATIONAL TRAFFIC NECESSITATED SETTING ASIDE AND ANNULLING THE ORDERS ENTERED IN CONNECTION WITH DECISION OF MAY 7, 1958

The **Third** reason advanced by the District Court for setting aside and annulling the orders of the Commission entered in connection with its decision of May 7, 1958, is to the effect that the Commission is bound by previous decisions dealing with international rate adjustments.

The summarization of the **Third** reason, which begins at R. 249 and runs through R. 252, is stated by the District Court as follows:

> * * * In summary, then, the Commission has consistently interpreted its statute in a manner contrary to its interpretation in the present case. This consistent interpretation ought not to be set aside, either by the courts or by the Commission, without a strong showing to justify departure. *United States v. Leslie Salt Co.*, 350 U. S. 383, 395-97 (1956); *FTC v. Bunte Bros.*, 312 U. S. 349, 351-52 (1941).

The District court erred when it held that "* * * the Commission has consistently interpreted its statute in a manner contrary to its interpretation in the present case." It should be noted that throughout the discussion of this **Third** reason, beginning with R. 249 and running through R. 252, the District Court makes no distinction between the Commission's previous administration of the Act as it relates to discrimination or as it relates to damages. Therefore it becomes necessary to deal with this error from the standpoint of discrimination and damages separately.

A. From the Standpoint of Discrimination

We have heretofore shown under Point III that the Commission has in the past ordered removal of undue preference and prejudice found to exist in international rate adjustments.

In the instant case the Commission entered two statutory findings relating to undue preference and prejudice.

First, the Commission found that the rates on the asbestos commodities from the Canadian mines to destinations in official territory and the Carolinas were unduly prejudicial to complainants and unduly preferential of their competitors to the extent that the rates to the considered Carolina destinations exceeded the rates to Ambler, Pennsylvania, and destinations taking the same rates by certain designated differentials (R. 77). Second, the Commission found that the rates on the asbestos commodities from Danville and other Canadian origins to destinations in official territory and Carolina destinations were unduly prejudicial to the complainants and unduly preferential of their competitors to the extent that the rates to the Carolina destinations failed to reflect differentials under the rates from the Quebec Central mines to Ambler, Pennsylvania, and destinations taking the same rates (R. 77, 78). It will be noted that the Commission did not attempt to regulate the through rates from the Canadian origins to the Carolina destinations; and neither did they attempt to regulate the single factor joint rates from the Canadian origins to the official territory destinations. The Commission simply held that the rates to the Carolina destinations, insofar as transportation took place in the United States, for the future, could not exceed rates maintained by the appellees from the Canadian origins to Ambler, Pennsylvania, and related destinations in official territory. In the case of tariff rates from the district mines on the Canadian National Railway the Com-

mission simply held that any existing differential which existed between the rates from the Canadian National Railway mines and those from the Quebec Central Railway mines to Ambler, Pennsylvania, and related destinations should be likewise maintained to the Carolina destinations.

It cannot be argued that the appellees do not have absolute freedom, under the Commission's order, to establish a rate adjustment to Ambler, Pennsylvania, and related destinations, and employ whatever form of tariff publication they choose, and then establish rates to the Carolina destinations in accordance with the Commission's order.

This is not regulation of the rates from Canadian origins to United States points. It is regulation of the relationship of rates between destinations within the United States far removed from the international boundary line.

Even though it may be assumed, *arguendo*, that the Commission in some previous cases declined to take positive administrative action, it does not justify annulment or setting aside of Commission orders entered in subsequent cases. Incidentally it may be stated that no two cases ever presented to the Commission contained identically the same facts and circumstances when it was called upon to determine questions relating to undue preference, or undue prejudice.

The courts are not concerned with the correctness of the Commission's reasoning or with the consistency or the inconsistency of decisions which it has rendered. See *Virginian Ry. v. United States*, 272 U. S. 658, 663-666; *Western Paper Makers' Chemical Co. v. United States*, 271 U. S. 268, 271.

In *Virginian Ry. v. United States, supra*, the court said (pp. 665-666):

> • • • This court has no concern with the correctness of the Commission's reasoning, with the sound-

ness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it.

B. **From the Standpoint of Damages**

We have shown hereinbefore under Point IV beginning at pages 34 to 42 that the Commission in 1916 laid down a fixed principle governing the disposition of complaints wherein reparation was requested for violation of section 1(5) of the Act (49 U. S. C. 1(5)). It was shown that this principle required that if damages were to be obtained, the complainant before the Commission was required to assail the through transportation charge whether that charge was based on a single factor joint rate or combination rates.

It has also been shown that the Commission failed to apply this fixed principle in the case of international rates involved in *Alberta Coal Sales Co. v. C. N. Rys., supra,* decided in 1928. The Commission granted reparation where only the domestic proportional rate was assailed and no allegation was made as to the reasonableness of the through rate from Canada, or the Canadian factor to the international boundary line. This Court in *Great Northern Ry Co. v. Sullivan, supra,* reversed the Commission and held that it did not have power under such circumstances to make an award of reparation and order the rail carriers to pay money.

It has heretofore been shown (p. 41) that the Commission in *E. A. Brown Produce Co. v. Atchison, T. & S. F. Ry. Co., supra,* decided in 1950, recognizes that reparation cannot be awarded in connection with international shipments unless the through transportation charges as a whole are assailed and found unlawful.

The cases cited by the District Court, and by the appellees before the Commission, for the most part deal entirely with reparation issues. Most of them, if not all, were

decided by the Commission prior to this Court's ruling in *Great Northern Ry. Co. v. Sullivan, supra.* Possibly in some instances certain divisions of the Commission have failed to follow the rule since 1935 and in fact very recently. Dismissal of complaints which assail through international rates and pray for reparation on the ground that the Commission does not have jurisdiction of one factor, because thereunder the transportation service was rendered in Canada, would be clearly an error of law. Such complaints should be considered on their merits and disposed of accordingly.

VI

THE COMMISSION HAS JURISDICTION UNDER THE ACT TO CONSIDER THE LAWFULNESS OF THE PROPORTIONAL RATE MAINTAINED BY THE CANADIAN CARRIERS TO EAST ALBURGH AND NEWPORT, VERMONT, AND ORDER THE REMOVAL OF ANY UNLAWFULNESS FOUND TO EXIST

The District Court erroneously turned its decisions on the jurisdiction of the Commission over the proportional rates maintained by the Canadian carriers to East Alburgh and Newport, Vermont. The lower court's statements of the question presented for decision, and its ultimate holding, reveal a totally erroneous approach in resolving the "Questions Presented" in this case.

The lower court stated:

> A single question is presented to this court: Does the Commission have jurisdiction over the foreign factor of a combination international rate when the foreign factor is a proportional rate from the points of origin to a border interchange within the United States? (R. 242.)

and concludes:

> We merely hold that the carriage of freight by rail on a proportional (fol. 298) rate from a point of origin in Canada, over the international boundary to a border point within the United States for the purpose of interchange is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate. (R. 253.)

It will be noted from the above that the District Court emphasizes that the proportional rates applied from points of origin in Canada to a border point in the United States for the purpose of interchange. This emphasis reflects the Court's finding that the Commission did not dispute the statement that there were no facilities for interchange available at the international boundary line or between the boundary line and East Alburgh and Newport; and further, that the Commission did not dispute that as to these particular proportional rates the Canadian carriers operated within the United States only for the purpose of turning over the asbestos to the American carriers (R. 247).

The appellees, defendants before the Commission, argued that it would not be practical or feasible to interchange traffic at the international boundaries north of Newport and East Alburgh. The Commission held that it did not perceive how this would affect the situation and stated that it had jurisdiction over rail carriers to the extent that they operated within the United States (R. 75).

Appellees again raised the same contention in their petition for reconsideration dated June 13, 1958. It was stated therein that:

> The only apparent alternative the petititoners might have would be either to attempt to interchange all traffic at the exact international boundary, or to publish rates applicable to and from the exact international boundary. They have heretofore shown that

it would not be practicable or feasible to interchange traffic at the exact international boundary, but the Commission dismisses that practical consideration with the indifferent comment that it does not perceive how that would affect the situation. Neither would it be practicable to publish rates between interior points in Canada and the exact international boundary, on the one hand, and points between the exact international boundary and interior points in the United States, on the other. As the Commission well knows, the carriers rarely, if ever, publish rates for application to or from a point on a line of railroad where there are no facilities for the receipt, delivery, or interchange of traffic. Any departure from that practice could only result in complicated, confusing, and possible doubtful or ambiguous tariff provisions. If the Canadian and American carriers continue to interchange traffic at the established ports of entry under the Commission construction of the statute in order to deprive the Commission of jurisdiction in any instance where the carriers elect not to join in joint international rates, it will be necessary for them to publish rates to and from the exact boundary line. (R. 119-120.)

Appellants in their reply to the petition of June 13, 1958, stated:

The Petitioners say that the Commission is impractical and unrealistic in this case because if the decision of the Commission is to stand, the defendants would have to publish rates from the international boundary line. There is nothing whatsoever to this argument. The Commission is asked to take judicial notice of the Tariffs and certain Items which are on file at this moment with the Interstate Commerce Commission and shown herein as Appendices A, B, and C. These items show that the defendants are publishing rates from the actual international boundary line. We make no comment as to the lawfulness of these rates since we do not know at this time whether or not the said rates inherently contain two terminal charges. We

simply say that there is nothing to this argument advanced by the defendants.

We call the attention of the Commission to the fact that the Tariffs and Items shown in Appendices A and B show (fol. 250) conclusively the carriers transporting property within the United States to or from the international boundary. In the case of Derby Line, Vt., located just north of Newport, Vt., on the Quebec Central, the Items and Tariffs referred to in Appendices A and B show conclusively that it is the Quebec Central which performs the service from the international boundary line. Attention is also called to East Alburgh, Vt., which is located on the Central Vermont Railway. There it is shown that the carrier transporting the property within the United States to or from the international boundary line is the Grand Trunk-Eastern Lines.

Attention is also called to the provisions in connection with Rouses Point, N. Y. Here again it is conclusively shown that there is a transportation service performed in the United States between Rouses Point and the international boundary line.

We believe that this is a complete answer to the defendants' argument that the Commission has no jurisdiction over these Canadian lines. By their own tariffs on file with this Commission—**They Admit.** (R. 211-212.)

The District Court acknowledged that the proportional rates applied to only a portion of the transportation service being rendered over a through route (see Note 4—R. 243). Nevertheless it considers the proportional rates as being independent units of charge for independent units of service. In this it erred. It separates and divides a single unit of charge and single unit of service which are indivisible. See *Through Routes and Through Rates, supra.* "Carolina Consumers", as complainants before the Commission, did not complain merely of the aggregate of the component parts of the through rates customarily charged by the de-

fendants before the Commission for transportation service rendered by the respective lines included in the through routes. They complained of the single charge as a single unit which was assessed for a single unit of transportation service from the point of origin in Canada to the points of destination in the Carolinas. See *Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co., supra; Through Routes and Through Rates, supra.*

As indicated in Points III and IV of this Argument, whether or not the Commission has jurisdiction over these proportional rates is immaterial in deciding the issues herein relating to discrimination or damages.

We desire, however, to deal with this phase of the District Court's decision since the proportional factors were, and are, used by the appellee carriers in constructing through rates which were, and are, being assessed "Carolina Consumers".

A. Jurisdiction of the Commission Relating to Award of Damages

This Court in *Great Northern Ry. Co. v. Sullivan, supra,* at pages 462 and 463 specifically held that the Commission may not order or permit payment of damages by way of reparation based on a finding that a proportional rate used in constructing a through rate is unjust and unreasonable. This within itself prohibits dividing the single unit of charge for a single unit of transportation service. To permit a division of the single unit of charge for the single unit of transportation service rendered would violate the rule long established by this Court and the Commission that when damages are in issue the through transportation charge must be assailed and considered.

The District Court advanced as a reason for holding that the proportional rates to East Alburgh and Newport, Vermont, were not subject to the Commission's jurisdiction

was based on the conclusion that to hold otherwise American carriers could be held liable for a portion of overcharges they had no part in formulating (R. 249).

As to this the District Court completely ignored the law of joint tort-feasor liability as it relates to damages. All participating carriers in through rates, single factor or combination, are joint tort-feasors if the through rates are found unjust and unreasonable. See *Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co., supra; News Syndicate Co. v. New York Cent. R. Co., supra; Lewis-Simas-Jones Co. v. Southern Pac. Co., supra; Great Northern Ry. Co. v. Sullivan, supra;* and *Atlantic & Y. Ry. Co. v. Carolina Button Corporation, supra.*

It should be pointed out that if the appellee carriers were of the opinion that the proportional factors were responsible for any unreasonableness in the through rates, the burden was on them to come forward with proof to that effect. The complainants before the Commission had alleged unlawfulness under section 1(5) of the Act (49 U. S. C. 1(5)) and in their presentation in chief presented evidence to prove their allegation. The burden of proof shifted to the appellees; and they being unable to defend on the merits, asserted that the Commission was without jurisdiction in the premises.

B. **Jurisdiction of the Commission Relating to Rates for the Future**

The Commission has jurisdiction to determine the future lawfulness of the proportional rates from the Canadian origins to East Alburgh and Newport, Vermont, should they be attacked. This is true both as to section 1(5) and 3(1) of the Act (49 U. S. C. 1(5) and 3(1))). Jurisdiction would arise from the fact that the Canadian National Railway Company and the Quebec Central Railway Company have failed to make and publish a rate for that part of the trans-

portation service performed between the international boundary line and East Alburgh and Newport, Vermont, respectively. This failure is a violation of the statutory duty imposed by the Act. The failure is comparable to the failure of the defendant railroads involved in *News Syndicate Co. v. New York Cent. R. Co., supra*, pages 186 and 187. Failure to comply with statutory duty does not evaporate the obligation to maintain and assess just and reasonable transportation charges for the service rendered within the boundaries of the United States.

Of course, these Canadian carriers are at liberty to publish, for future application, a rate from the mines in Canada to the international boundary line and file the same with the Canadian Commission; and in another tariff make and publish a rate for that part of the transportation service from the international boundary line down to East Alburgh and Newport, Vermont, and file the said tariff with the Interstate Commerce Commission.

The District Court seemed to be of the opinion that such publications by the Canadian rail carriers would be a useless undertaking. This overlooks the fact that these Canadian carriers, and other participating carriers in the through transportation service, are under a statutory duty to make and publish reasonable and nondiscriminatory charges from the international boundary to the Carolina destinations.

These proportional rates are in no way different than the joint rates established and maintained by the rail carriers on newsprint paper from Thorold, Ontario, to New York City. The proportional rates apply for single line application from the Canadian points to points in the United States 3 to 5 miles south of the international boundary line. Any distinction between the two factual situations would be without legal significance.

The newsprint rates referred to were those dealt with by the Commission in *Ontario Paper Co. v. C. N. Rys.*, 95 I. C. C. 66, 102 I. C. C. 365, which was under review by this Court in *News Syndicate Co. v. New York Cent. R. Co., supra.* Thorold is in Ontario on the Canadian National Railways 30 miles north of Black Rock, New York, where an interchange connection is made with the New York Central Railroad Company and other United States lines, and also 12 miles north of Suspension Bridge, New York, where interchange connection is made with the same New York Central Railroad and other United States lines. This Court held that: "No rates were made or published for the transportation from the international boundary to New York City." See Page 185 of U. S. 275. In the instant case no rates were established or published from the international boundary line to East Alburgh or Newport, Vermont. That is a certainty.

It is said that East Alburgh and Newport, Vermont, are ports of entry—well—Black Rock and Suspension Bridge, New York, are likewise ports of entry. This Court, in *News Syndicate Co. v. New York Cent. R. Co., supra,* did not say that it was the duty of the rail carriers to establish rates for that part of the transportation from the ports of entry of Black Rock and Suspension Bridge—on the contrary—it stated emphatically that it was the duty of the rail carriers under the Act to establish just and reasonable rates from the international boundary line to New York City. This Court is asked to take judicial notice of the fact that the international boundary line, separating the United States from the Dominion of Canada in the vicinity of Black Rock and Suspension Bridge, New York, is situate in the middle of the Niagara River.

In its decision of May 7, 1958 (R. 60), the entire Commission cited *Newsprint Paper to Detriot*, 161 I. C. C. 637 (Division 5), wherein at page 639 it was held:

> It is between 2 and 3 miles over the routes of movement from the international boundary (the middle of the Detroit River) to the point in Detroit at which the shipments were delivered. No rate was or is published by the Michigan Central for that part of the transportation which took place within the United States. The Michigan Central admits that its failure to publish such a rate was a violation of section 6 of the act. We have under such circumstances jurisdiction to determine whether the complainant and the interveners were injured by such violation and, if so, to award damages resulting therefrom. * * *

Newsprint Paper to Detroit, supra, was decided March 8, 1930. The decision of this Court in *News Syndicate Co. v. New York Cent. R. Co., supra,* was rendered November 21, 1927. Here again Detroit, Michigan, is a port of entry and to this port of entry the Commission held that it had jurisdiction because of the failure of the Michigan Central to publish a rate for that part of the transportation service rendered from the middle of the Detroit River to Detroit.

The District Court missed entirely the purpose for which the Commission cited *Fruit Importers v. Atlantic Coast Line R. Co.*, 203 I. C. C. 139 (1934); *Newsprint Paper to Detroit, supra; Simpson Co. v. G. T. W. Ry. Co.*, 129 I. C. C. 430 (1927); *Larrowe Milling Co. v. C., W. & L. E. R. R.*, 52 I. C. C. 145 (1919); *Iron or Steel Wire, Buffalo, N. Y., to Kitchener, Ontario*, 294 I. C. C. 515 (1955) when it distinguished these cases on the ground that they involved joint rates or practices relating thereto, whereas, the instant case involves through rates made on a combination

basis."[1] This was a distinction without legal significance. The question presented is where did the Commission's jurisdiction attach. The answer is at the international boundary line.

The District Court also referred to *Status of Napierville Junction Ry. Co.*, 266 I. C. C. 471 (1946), and *Control of Hereford Ry. Co.*, 99 I. C. C. 7 (1925) (R. 250) which the Commission cited in its decision of May 7, 1958, in support of its holding that its jurisdiction attached at the international boundary line. The District Court stated that: "These * * * two cases hardly support the expanded interpretation of its jurisdiction which the Commission has advanced in the present case." (R. 250.) Subsequently in the District Court's opinion (R. 252) it is stated:

> Finally, the Commission argues that unless we accept its present interpretation there will be left an unregulated "no-man's land" between the international boundary and the interchange points. This argument is unpersuasive. **The issue here is whether the Commission has jurisdiction over certain rates, not whether the Commission has jurisdiction over the Canadian carriers.** If, for example, the Canadian carriers sought to abandon service between the interchange points and the border, or if they sought to lease their trackage in the United States to another carrier, the Commission clearly would have jurisdiction. See *Control of Hereford Ry. Co.*, 99 I. C. C. 7 (1925); *Lease of Line by Canadian Pac. R. Co.*, 105 I. C. C. 575 (1926). (Emphasis supplied.)

It will be noted from the above statement that the District Court concedes that the Commission has jurisdiction over the Canadian carriers themselves—Canadian National Railway Company and Quebec Central Railway Company—if they seek to discontinue service between the inter-

[1] The District Court said: "The rates the Commission found unreasonable and prejudicial in the present case, however, were not joint rates; but were combination rates." (R. 247.)

change points and the international boundary line or if they seek to lease their trackage which is in the United States. Attention of the Court is called to the fact that section 1(18) of the Act (49 U. S. C. 1(18)) prohibits abandonment of any portion of a railroad, subject to the Commission's jurisdiction (section 1(a) and (c) 49 U. S. C. 1(a) and (c)), without first securing from the Commission a certificate of public convenience and necessity authorizing the abandonment. Section 5(2)(a) and (b) of the Act (49 U. S. C. 5(2)(a) and (b)) prohibits carriers subject to the Commission's jurisdiction from leasing any or all of their properties without first securing authority from the Commission.

Particular attention is directed to the following sentence appearing in the statement above: "The issue here is whether the Commission has jurisdiction over certain rates, not whether the Commission has jurisdiction over the Canadian carriers." There is nothing in the Interstate Commerce Act which supports the distinction made by the District Court with respect to the Commission's jurisdiction over the Canadian carriers operating in the United States in regard to abandonment or lease matters as against rate matters. We fail to find any decision of a court of competent jurisdiction, or the Commission, which makes such a distinction. It will be noted that the District Court does not cite any authority for the distinction.

The concession on the part of the District Court that the Commission has jurisdiction over the Canadian National Railway Company and the Quebec Central Railway Company, in the matter of abandonment and lease matters squares with this Court's holding in *News Syndicate Co. v. New York Cent. R. Co.*, *supra*, at pages 186 and 187, that the Interstate Commerce Act applies to the lines that carried the paper from the international boundary to New York City. The distinction made by the District Court as

to rate matters, however, is in direct conflict with this Court's holding in the case cited—same pages—that the Interstate Commerce Act applied to the rates charged for the transportation of the paper from the international boundary line to New York.

Can it be successfully argued that the Canadian National Railway Company and the Quebec Central Railway Company are not subject to the jurisdiction of the Commission **because** they published proportional rates from the Canadian origins to ports of entry 3 to 5 miles south of the international boundary line for the purpose of interchange? We do not think so.

Hearing Examiner Arnold J. Roth in his Proposed Report met such an argument head-on. He stated:

> The contentions of the defendants proceed from the assumption that the points of Newport and East Alburgh are for all practical purposes border points, and that the rates here in issue conform to the first alternative indicated above. The facts, however, indicate otherwise. East Alburgh is some 3 miles from the border, and Newport is 5 miles beyond it. The proportional rates maintained by the Canadian lines are applicable only on traffic destined to points in the United States, and they obligate these carriers to provide transportation service within the borders of the United States. Jurisdiction is not a concept governed by practical considerations, but is absolute. To the extent, therefore, that transportation within the United States under the proportional rates is performed by the Canadian lines, they are subject to the jurisdiction of the Commission. (R. 191.)

We believe that it is indisputable that the Commission, under the Act, has authority to require the Canadian National Railway Company and the Quebec Central Railway Company to establish just and reasonable, non-preferential and non-prejudicial rates from the international boundary

line to East Alburgh and Newport, Vermont. The Commission also has power to issue a cease and desist order prohibiting further participation by the appellee railroads, all of whom are subject to the jurisdiction of the Commission, in the through rates now being assessed both to destinations in official territory and to the Carolina destinations, and require the establishment of just and reasonable non-preferential and non-prejudicial rates from the international boundary line to the said areas.

If the Commission does not have this jurisdiction, then it is impotent insofar as international rates are concerned. If this impotency exists, then Congress has left the appellee railroads free to discriminate at will in connection with international shipments originating in Canada and destined to any point or area in the United States. By utilizing different forms of tariff publication they can evade their responsibilities and engage extensively in the very practices which the Interstate Commerce Act was designed to prohibit and prevent.

In *Interstate Com. Com. v. Baltimore & O. R. Co.*, 225 U. S. 326, this Court said:

> * * * Tariffs are but forms of words, and certainly the Commission, in the exercise of its powers to administer the interstate commerce act, can look beyond the forms to what caused them and what they are intended to cause and do cause.

The point under discussion is of vital interest to "Carolina Consumers" for if the Commission does not have any jurisdiction whatsoever over these proportional rates, and as an end result no jurisdiction over the through transportation charges assessed, then the appellee railroads are placed in a position to demand exorbitant rates in the form of through transportation charges and discriminate at will without intervention or hindrance from the Commission.

In *Cyanamid and Cyanide From Niagara Falls, supra,* decided in 1929, the Commission suspended certain tariff schedules proposing increased rates on cyanamid and crude cyanide, in carloads, from Niagara Falls, Ontario, Canada, to destinations in New England territory, Cincinnati, Ohio, and Virginia cities, and instituted an investigation as to the lawfulness of the proposed ncreased rates.[18] The Commission's power to suspend and institute an investigation was challenged, and it was argued that the Commission did not have jurisdiction over the proposed increased international joint rates.

It was contended by the challenging rail carriers that this Court's decision in *News Syndicate Co. v. New York Cent. R. Co., supra,* related to damages **alone** and that the Commission had been empowered to determine the reasonableness of a joint international rate **only** when the issue related to damages and not rates for the future. The entire Commission rejected the contention and stated that the advocates of such a construction of this Court's decision in *News Syndicate Co. v. New York Cent. R. Co., supra,* would add the word "only" to this Court's answer to question 1 which was answered as follows: "Yes, for the ascertainment of damages." (p. 188, 275 U. S.). The Commission held that addition of the word "only" was not justified and reasoned as follows (see p. 491 of 155 I. C. C.):

> It must be borne in mind, however, that the questions certified to the court and its answers were addressed to a suit for damages based upon a reparation order made and entered by us. The holding that the United States carriers in that case had committed a tort in failing "to make or publish any rate **applicable** to that part of the transportation" (which took place within the United States) is not conclusive that they could commit no tort in respect of a joint international rate. To find otherwise would be to free from any regu-

[18] This decision of the Commission was referred to under Point III.

lation every joint international rate now participated in by the United States lines and to render impotent our jurisdiction even over that portion of the transportation which "takes place within the United States." And this would be true not alone as to the "reasonableness" of such rates, which was the only question considered by the court, but to questions of undue prejudice and unjust discrimination as well.

If the duty of the United States carriers to publish rates to and from the international boundary, referred to by the court, is exclusive and all embracing, then it must follow that participation in a joint international rate is *ipso facto* unlawful. We do not so construe the law. Moreover, such construction would not square with the statement of the court that "Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error." It is impossible to conceive of a "just and reasonable" rate as the product of a tortious act.

The Commission held that the suspended schedules had not been justified and required their cancellation, without prejudice, to the filing of new schedules in conformity with the views expressed.

The Commission exercised jurisdiction in *Cyanamid and Cyanide From Niagara Falls, supra*, because from the record it did not appear the rail carriers involved had complied with the Act and established rates from the international boundary line to the involved destinations in the United States. The international boundary line is situate in the middle of the Niagara River between Niagara Falls, Ontario (where the shipments originated), and Niagara Falls, New York.

It is clear that the District Court erred in holding that these proportional rates were beyond the jurisdiction of the Interstate Commerce Commission for any purpose whatsoever.

CONCLUSION

The judgment of the District Court should be reversed.

Respectfully submitted,

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